Mallisamy a/l Periasamy & Anor v Pentadbir Tanah Melaka Tengah & Anor

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24–453 OF 1996
SURIYADI J
26 MARCH 1997

Land Law *— Acquisition of land — Alteration of award — Whether collector could alter, change or amend an award already given — Whether collector has inherent powers similar to that of the courts in amendment of award — Whether collector is functus officio after he has delivered his decision*

Administrative Law *— Rules of natural justice — Audi alteram partem — Whether each party affected by the award of a collector must be heard before the collector may alter his award — Whether collector has acted improperly in hearing evidence of one party in the absence of the other party before altering the award*

By way of a gazette dated 15 September 1994, it was declared that Lot 1614 Mukim Ayer Molek Daerah Melaka Tengah, Melaka ('the land') was to be compulsorily acquired. On 3 November 1994, an enquiry was held before the collector ('the first defendant'). Only the plaintiffs and/or their representatives were present. The first defendant was aware that the land was charged to the second defendant but nevertheless proceeded with the enquiry despite the second defendant's absence. Compensation of RM206,984.20 was duly ordered to be paid. The plaintiffs objected that the compensation was on the low side and the matter was referred to the High Court. The money was also deposited into court. At this stage, the second defendant began to communicate with the first defendnat which culminated in the first defendant applying to court requesting that the sum RM206,984.20 be withdrawn and paid to the second defendant. On 12 March 1996, the court allowed the application. On 27 June 1996, the first defendant — in total disregard of its original order dated 3 November 1994 and without affording the plaintiffs a chance to be heard — diverted the compensation sum to the second defendant's solicitors. The plaintiffs commenced this application for a declaration that the second order of 27 June 1996 be declared void and the sum of RM206,984.20 be rediverted to the plaintiffs.

Held, allowing the application:

(1) In this case, the first defendant was carrying out his duty in a judicial capacity. Pursuant to that capacity, once the first defendant had delivered his award, matters should be left as they were. Any alteration, change or amendment which was major and necessary should be left to a court of higher jurisdiction. The first defendant was not at liberty to even correct a manifest error and was not endowed with inherent powers similar to that of the courts (see pp 500A–B and 503B–C); *Pearlman (Veneers) SA (PTT) Ltd v Bernhand Bartels* [1954] 1 WLR 1457, *Hotel*

Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 221 and *Henry William Hatton v Hugh Harris* [1892] AC 547 followed.

Furthermore, the first defendant was functus officio after he had delivered his decision of 3 November 1994. Therefore, the second order dated 27 June 1996 redirecting the sum of RM206,984.20 to the second defendant was defective. The amended award was for all intents and purposes a mere piece of paper and thus a nullity (see p 503A–B); *Mordue v Palmer* (1870) 6 Ch App 22, *Re an arbitration between Stringer and Biley Brothers, Re* [1901] 1 QB 105 and *Sutherland & Co v Hannevig Brothers Ltd* [1921] 1 KB 336 followed.

(2) On the concept of audi alteram partem, the first defendant had violated the elementary principle of justice which required that each party be heard before the collector altered his award. In the present case, after having received the letters from the second defendant and without giving the plaintiffs an opportunity to reply to the assertions therein, the first defendant went against his original award. The procedure and practice of the first defendant was clearly wrong as he had acted improperly in hearing evidence of one party in the absence of the other party (see p 503D–E); *W Ramsden & Co Ltd v Jacobs* [1922] 1 KB 640 followed.

[Bahasa Malaysia summary

Melalui suatu warta bertarikh 15 September 1994, ia diisytiharkan bahawa Lot 1614 Mukim Ayer Molek Daerah Melaka Tengah, Melaka ('tanah tersebut') akan diambil secara wajib. Pada 3 November 1994, suatu siasatan telah diadakan di hadapan pemungut ('defendan pertama'). Hanya plaintif-plaintif dan/atau wakil-wakil mereka hadir. Defendan pertama sedar bahawa tanah tersebut digadai kepada defendan kedua tetapi namun begitu meneruskan dengan siasatan meskipun defendan kedua tidak hadir. Pampasan sebanyak RM206,984.20 diperintahkan dibayar. Plaintif-plaintif membantah bahawa pampasan adalah sedikit dan perkara itu telah dirujuk kepada Mahkamah Tinggi. Wang juga telah didepositkan ke dalam mahkamah. Pada peringkat ini, defendan kedua mula berkomunikasi dengan defendan pertama yang menyebabkan defendan pertama memohon kepada mahkamah meminta supaya jumlah RM206,984.20 ditarik balik dan dibayar kepada defendan kedua. Pada 12 Mac 1996, mahkamah membenarkan permohonan. Pada 27 Jun 1996, defendan pertama — dengan mengabaikan sama sekali perintah asalnya bertarikh 3 November 1994 dan tanpa memberi peluang kepada plaintif-plaintif untuk didengar — memindahkan jumlah pampasan kepada peguamcara defendan kedua. Plaintif-plaintif memulakan permohonan ini untuk satu perisytiharan bahawa perintah kedua bertarikh 27 Jun 1996 diisytiharkan tak sah dan jumlah RM206,984.20 dipindahkan kepada plaintif-plaintif.

Diputuskan, membenarkan permohonan:

(1) Dalam kes ini, defendan pertama menjalankan tugasnya dalam keupayaan kehakiman. Menurut keupayaan itu, sebaik saja defendan pertama menyampaikan awardnya, perkara itu sepatutnya dibiarkan begitu sahaja. Sebarang pengubahan, pertukaran atau pindaan yang besar dan perlu patutlah dibiarkan kepada mahkamah yang mempunyai bidang kuasa lebih tinggi. Defendan pertama tidak bebas untuk membuat pembetulan yang menonjol dan tidak dikurniakan kuasa sedia ada yang serupa dengan yang dimiliki oleh mahkamah (lihat ms 500A–B dan 503B–C); *Pearlman (Veneers) SA (PTT) Ltd v Bernhand Bartels* [1954] 1 WLR 1457, *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 dan *Henry William Hatton v Hugh Harris* [1892] AC 547 diikut.

Tambahan pula, defendan pertama adalah functus officio selepas beliau menyampaikan keputusan pada 3 November 1994. Oleh yang demikian, perintah kedua bertarikh 27 Jun 1996 yang mengarahkan semula jumlah RM206,984.20 kepada defendan kedua adalah cacat. Award terpinda adalah untuk semua tujuan sekadar sehelai kertas dan justeru itu suatu pembatalan (lihat ms 503A–B); *Mordue v Palmer* (1870) 6 Ch App 22, *Re an arbitration between Stringer and Biley Brothers, Re* [1901] 1 QB 105 dan *Sutherland & Co v Hannevig Brothers Ltd* [1921] 1 KB 336 diikut.

(2) Mengenai konsep audi alteram partem, defendan pertama telah melanggar prinsip dasar keadilan yang menghendaki setiap pihak didengar sebelum pemungut menukar awardnya. Dalam kes ini, setelah menerima surat-surat daripada defendan kedua dan tanpa memberikan plaintif-plaintif peluang untuk membalas kepada penegasan di dalamnya, defendan pertama bertentangan dengan award asalnya. Prosedur dan amalan defendan pertama jelas adalah salah kerana beliau telah bertindak secara tak wajar dalam mendengar keterangan suatu pihak dalam ketidakhadiran satu lagi pihak (lihat ms 503D–E); *W Ramsden & Co Ltd v Jacobs* [1922] 1 KB 640 diikut.]

Notes

For cases on acquisition of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1164–1309.

For cases on the rule audi alteram partem, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 457–458.

Cases referred to

An arbitration between Stringer and Riley Brothers, Re [1901] 1 QB 105 (folld)

Brooke v Mitchell (1840) 6 M & W 473 (refd)

Harrison's Share under a Settlement, Re; Harrison v Harrison [1955] 1 Ch 260 (refd)

Henfree v Bromley (1805) 6 East 309 (refd)
Henry William Hatton v Hugh Harris [1892] AC 547 (folld)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)
Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 221 (folld)
Khoo Cheng Tat v Lim Soon Teik & Anor; BM Kamdar, intervening [1982] 1 MLJ 289 (refd)
Millensted v Grosvenor House (Park Lane) Ltd [1937] 1 KB 717 (refd)
Mordue v Palmer (1870) 6 Ch App 22 (folld)
Ooi Sim Yim v PP [1990] 1 MLJ 88 (refd)
PP v Heng You Nang [1949] MLJ 285 (refd)
Pearlman (Veneers) SA (Pty) Ltd v Bernhard Bartels [1954] 1 WLR 1457 (folld)
VGM Holdings Ltd, Re [1941] 3 All ER 417 (refd)
State of Bombay v Geoffrey Manners & Co AIR 1951 Bom 49 (refd)
Suffield and Watts, Re, ex p Brown (1888) 20 QBD 693 (refd)
Sutherland & Co v Hannevig Brothers Ltd [1921] 1 KB 336 (folld)
W Ramsden & Co Ltd v Jacobs [1922] 1 KB 640 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 278
Land Acquisition Act 1960
Criminal Procedure Code s 260(2) [India]

Yau Jiok Hua (*Yau Jiok Hua & Co*) for the plaintif.
Meor Hashimi bin Hashim (State Legal Adviser) for the first defendant.
T Paramsivam (*Muthuvelu Param Rosdin & Co*) for the second defendant.

Suriyadi J: Vide a gazette dated 15 September 1994, the State Authorities declared that Lot 1614 Mukim Ayer Molek, Daerah Melaka Tengah, Melaka was to be acquired by the government. On 3 November 1994, an enquiry was held before Tuan Hj Abu Bakar bin Hj Othman ('the collector'). Only the plaintiffs or their representatives were present. The second defendant was not in attendance on that hearing date as the notice could not be served on the last known address (see WIWS 2A, 2B and 2C). Despite knowing that the land was charged to the second defendant and despite the latter's non-presence, the hearing still proceeded on. Having considered the totality of the evidence, the collector ordered that Subramaniam s/o Muniandy, Sanniasy s/o Palaniandy, Nallisamy s/o Periasamy and Narayanan s/o Othayanan be compensated by virtue of that acquisition. Vide N2 as per encl 2 Form O, the collector referred the matter to the High Court on the basis of the objections of the plaintiffs that the compensation offered was on the lower side. From the documents adduced, I was satisfied that the collector never made an order that the second defendant was entitled to any form of compensation. After scrutinizing the facts and the documents, I observed that apart from the failed attempt to serve a notice of the hearing to the second defendant, the involvement of the latter was next to zero.

A After the money had been deposited into court, the second defendant reared its head, and vide a letter dated 11 July 1995 (WIWS 4A), its chief executive informed the collector that the company had delegated the necessary powers to its lawyers to recover the said sum of money on its behalf. By reason of the communications between the first and second B defendants, the former applied to the court requesting that the RM206,984.20 be withdrawn and paid to the second defendant. The court on 12 March 1996 pursuant to that application acceded to it. On 27 June 1996, the collector — in total disregard of its original order, and in total disregard of the principle of audi alteram partem vis-a-vis the plaintiffs — diverted that compensation sum to the second defendant via C their lawyers.

Being unhappy with the cavalier attitude of the collector, the plaintiffs — in brief, vide the originating summons as in encl 1 — came before me to pray that the second order of the first defendant be declared void with the said sum of money of RM206,984.20 rechannelled to the plaintiffs.

D By reason of the simple facts and the bizarre outcome of the original compensation order, I found no difficulty in detecting the misconduct of the collector on two grounds, namely that:

(1) he was functus officio after he had delivered the decision of 3 November 1994; and

E (2) when he diverted the payment to the second defendant, the collector had acted unfairly as he had heard evidence of one party in the absence of the other.

I intimated to the parties that on 3 November 1994, the collector had F already discharged his duty as he had done what he was supposed to have done under the Land Acquisition Act 1960. His ignoring of the rights of the plaintiffs when he unilaterally withdrew the appeal from the court without even informing the plaintiffs merely compounded the defect further. He went overboard when he disregarded the original order and had the money channelled to the second defendant. The contents of the two G unrebutted letters sent by the second defendant must have convinced him, hence the unusual action.

Spinning off from the above, one must bear in mind that an arbitrator (in this case the collector) when carrying out his duty is vested with a certain amount of discretion and fettered by rules normally observed by H arbitrators, umpires or tribunals. On point is 1 *Halsbury's Laws of England* (4th Ed) p 70 where it reads:

> If, on the other hand, the impugned act or decisions is, or is analogous to, the exercise of a judicial discretion characteristically vested in a tribunal, the courts will insist on the observance of more rigorous criteria. A magistrate I or tribunal taking irrelevant factors into account or failing to have regard to relevant factors will be held to have failed to hear and determine the matter according to law, or to have declined jurisdiction or to have exceeded jurisdiction.

It is thus quite safe to say that in this case, the collector was carrying out his duty in a judicial capacity and was thus bound by certain factors required by the law. In this case, pursuant to that capacity, once the collector had delivered his award, he should have left matters as they were. Any alteration, changes or amendments which were major and necessary should have been left to a court of higher jurisdiction. The collector or any parties interested should have taken the course of revealing all the facts before the High Court and let the act or decision be done as an act of the court and not of the collector.

Whether he had altered, changed or had made a mistake, I viewed his decision to be void on the basis of the principle of functus officio. Resorting to *Jowitt's Dictionary of English Law* (2nd Ed) at p 840, 'functus officio' means:

> ... (having discharged his duty), an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted ... .

Aside from not being permitted to mete out a totally different award from the original award pursuant to the functus officio concept, it is also established under common law that a manifest error or obvious clerical error could not even be corrected by the arbitrator (see *Stroud's Judicial Dictionary* (4th Ed) which made reference to *Mordue v Palmer* (1870) 6 Ch App 22; *Henfree v Bromley* (1805) 6 East 309, *Brooke v Mitchell* (1840) 6 M & W 473. See the Arbitration Act 1950 s 17).

In contra distinction, the position of the judge is far superior, as aside from being armed to the teeth either by statute laws or common law, he is also endowed with inherent powers. Any order issued will not in law be construed as a final order unless perfected, ie by being passed and entered. During that transition period before being perfected, the judge may vary or alter it if necessary (see also *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717) and *Re Harrison's Share under a Settlement; Harrison v Harrison* [1955] 1 Ch 260).

For a discussion of the issue of powers of judges to alter orders that have not been perfected, a case in point is that of *Re Suffield and Watts, ex p Brown* (1888) 20 QBD 693 at p 697 where Fry LJ pointedly said:

> Was it competent to Cave J to rehear or modify the order which he had made on 6 April? I conceive that it was not. *Re St Nazaire Co* 12 Ch D 88 shews that when an order or judgment of the High Court has once been perfected, the court has no jurisdiction to alter it. So long as the order has not been perfected, the judge has a power of re-considering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end. Therefore, Cave J had no power to rehear the matter.

There is no dearth of cases in Malaysia on this matter and therefore suffice for me to merely refer to two cases. I begin with the case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 where Chang Min Tat FJ said (at p 144):

> Clearly, the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been

A entered or an order after it is drawn up, except under the slip rule in O 28 r 11 of the Rules of the Supreme Court 1957 [O 20 r 11 of the Rules of the High Court 1980] so far as is necessary to correct errors in expressing the intention of the court ... .

In the case of *Khoo Cheng Tat v Lim Soon Teik & Anor; BM Kamdar, intervening* [1982] 1 MLJ 289 at p 290, Raja Abdul Aziz Addruse JC said:

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> The general rule with regard to amendment of any order which has been drawn up is that no court or judge has power to alter or vary such order either in an application in the original action or matter, or in a fresh action brought to review it. The object of such a rule is to ensure that those who are affected by the order can with certainty conduct themselves in relation to that order. There must, however, be certain exceptions to this general rule if injustice is to be avoided; and it has long been accepted that the court has power to correct any clerical mistake caused by accidental slips or omissions, and to vary the order for the purpose of giving effect to its meaning and intention: see *Re Swire Mellor v Swire* 30 Ch D 239 at p 249.

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D Even though leeway is given to the High Court to review or alter its judgment in the event of there being some obvious mistake on the face of the record or of some clerical error, that power is to be exercised sparingly (see *State of Bombay v Geoffrey Manners & Co* AIR 1951 Bom 49).

The principle of not altering an order is also entrenched in our criminal law. For this purpose, I would like to refer to s 278 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') which reads:

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> No Court, other than a High Court, having once recorded its judgment, shall alter or review the same: provided that a clerical error may be rectified at any time, and that any other mistake may be rectified at any time before the Court rises for the day.

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With regard to perfecting a judgment made by a judge that has not been perfected, the case of *PP v Heng You Nang* [1949] MLJ 285 confirms that provision where it was held that once a judgment in a criminal matter had been pronounced and signed, it could not be altered with that relevant court having no power to vary its decision. Whether the powers of the

G High Court for criminal cases were co-extensive with that of the powers of the judge in civil cases, *Mallal's Criminal Procedure* (4th Ed) at p 415 had this to say:

> Alteration or Review of Judgment — Under sub-s (2) of this section, all courts can rectify clerical errors and other mistakes before the court rises for the day. Specific power, however, has been given to the High Court to alter or review its judgment after it has been recorded. The power conferred on the High Court under sub-s (1) of this section appears to be in any event co-extensive with the limited power of a judge in civil litigation to recall his judgment before the order is perfected: *Re Harrison's Share under a Settlement* [1955] 1 Ch 260 (CA).

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I The writer was discussing sub-s (2) of s 260 of the Indian Criminal Procedure Code which is in pari materia with that of the above s 278 of the Malaysian CPC. This commentary was cited with approval by Mohd Azmi SCJ (now FCJ) delivering the judgment of the (then) Supreme Court in the case of *Ooi Sim Yim v PP* [1990] 1 MLJ 88 at p 91. In the process,

before allowing the appeal in part, Mohd Azmi SCJ examined some cases which expressed the opinion that s 278 conferred no jurisdiction upon the High Court the power to alter or review its judgment once it had been recorded and delivered. In that case, his Lordship, after a critical examination of the peculiar facts, opined that as the judgment by the High Court was equivocal and capable of two interpretations, then the advantage should tilt to the appellant. Founded on that reason, he then held that in that case s 278 of the CPC did not empower the learned judicial commissioner to substitute his judgment two and a half months after it was recorded and delivered.

Following from the above cases, in the normal course of events, once a final order has been passed, the judge is exhausted of his duty. The legal principle is well put in the case of *Re VGM Holdings Ltd* [1941] 3 All ER 417 where at the headnote, it reads:

> Where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

With regard to the legal position to arbitrators, a case in point is *Mordue v Palmer* (1870) 6 Ch App 22 at p 31 where Sir G Mellish LJ said:

> I am of the same opinion. I think the result of the cases at law is that when an arbitrator has signed a document as and for his award, he is functus officio, and he cannot of his own authority remedy any mistake. I regret the costs and delay which have been occasioned in this case, but I think it is right that in all such cases the parties should come to the court to remedy the mistake.

In *Re an arbitration between Stringer and Riley Brothers* [1901] 1 QB 105, where the facts are not exactly on point with the current case (though the legal principles are relevant), Lord Alverstone CJ said at pp 106–107:

> An award has been made, and to that award an objection has been taken of a somewhat curious kind. ... Mr Stringer, one of the parties to the arbitration, ... found that he could not understand it, and ... thereupon he sent it back to the umpire. ... . The award went back to the umpire, and then for the first time he became aware that there was a written submission, and he accordingly perused the submission and drew a fresh award in proper form.
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> I think that second award was bad. In my opinion, the old authorities are still binding upon us, and I think that when the umpire had made the first award he was functus officio.

Similarly, in *Sutherland & Co v Hannevig Brothers Ltd* [1921] 1 KB 336, the court set aside an award that had been altered by an arbitrator. McCardie J at p 342 voiced out that:

> This alteration was a serious matter, and it clearly involves a serious point of law as to the power of the arbitrator to make it. Under the old law, it is quite clear that he could not have made it, for the law was most rigorous as to the limitation of an arbitrator's powers, and from the moment he put forward a paper as his award, he was functus officio, and could not put right any mistake at all; any alteration was nugatory and the old award stood ... .

A Having been fortified by the above cases, I had no hesitation in concluding then that the collector was functus officio, resulting in the order by him redirecting the sum of money amounting to RM206,984.20 to be defective. The amended award therefore, for all intents and purposes, was a mere piece of paper, and thus a nullity. If he was not at liberty to B even correct a manifest error, it would be a travesty of justice if he were empowered to replace the original order with a totally new one. Furthermore, it must be borne in mind that he was not endowed with inherent powers similar to that of the courts (see *Pearlman (Veneers) SA (Pty) Ltd v Bernhard Bartels* [1954] 1 WLR 1457; *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 and *Henry William* C *Hatton v Hugh Harris* [1892] AC 547, per Lord Watson). To wind up this legal poser, if ever there was any correction to be done on the original order, then it was the business of the courts to do so after an appeal had been lodged, and not by the collector.

On the concept of audi alteram partem, the first defendant had D violated the elementary principle of justice which required that each party be heard before the collector altered his award. The facts revealed that after having received the letters from the second defendant — and without giving the plaintiffs the opportunity to reply to the assertions of the second defendant — the collector went against his original award. It would have been sufficient for me to give the order prayed for merely on this ground E as it was quite clear that the procedure and practice of the first defendant was clearly wrong. He had acted improperly in hearing the evidence on behalf of one party in the absence of the other (see *W Ramsden & Co Ltd v Jacobs* [1922] 1 KB 640).

On the above grounds, I gave order in terms to encl 1.

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Application allowed.

Reported by Lew Chee Seong

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